Supreme Court of the United States

No. 182.

WM. E. ADGER, ADMINISTRATOR OF JOHN ADGER, DECEASED, PLAINTIFF IN ERROR,

vs.

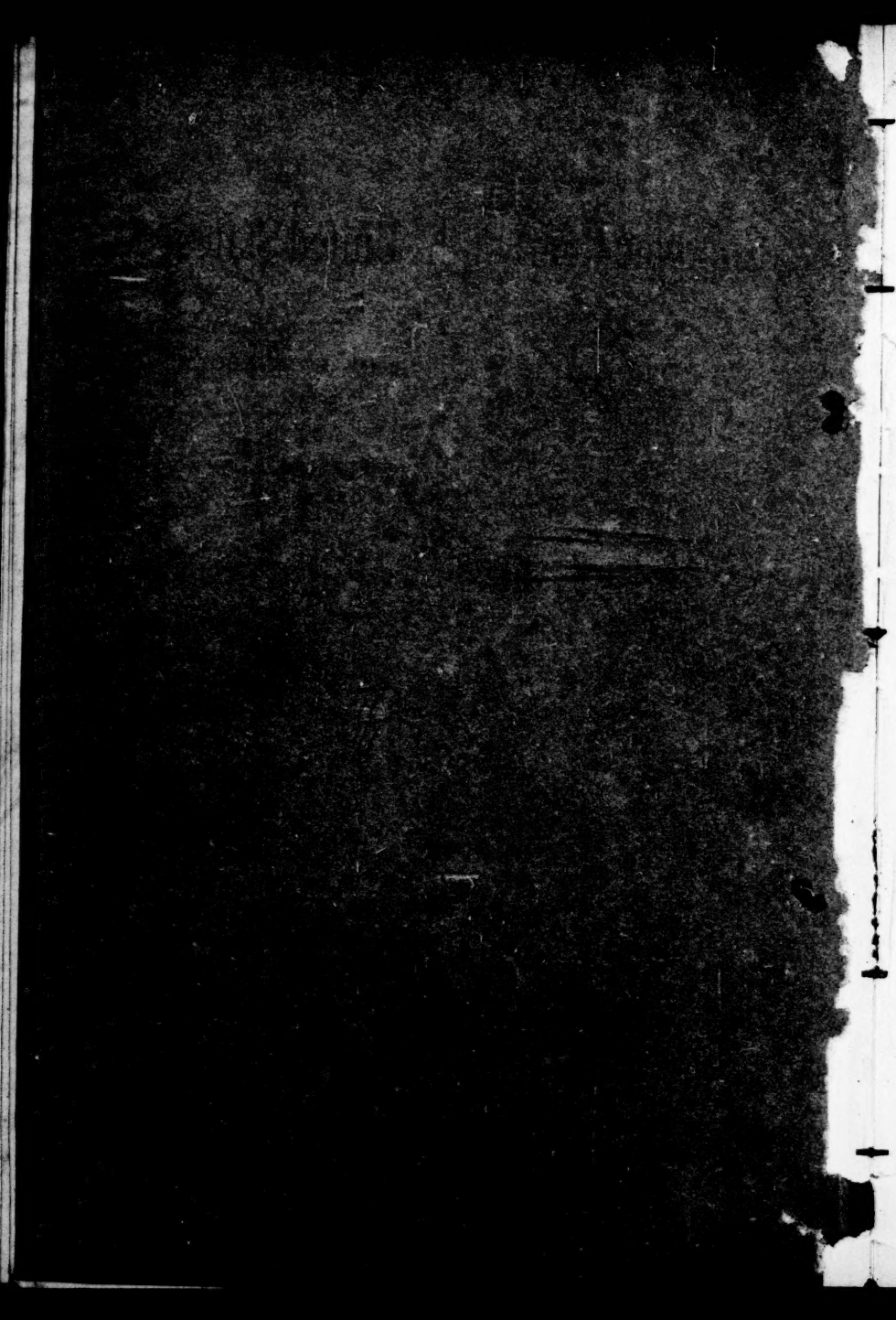
WM. S. ALSTON, EXECUTOR OF WILLIAM J. ALSTON, DECEASED, DEFENDANT IN ERROR.

To the Circuit Court of the United States for the District of Louisiana.

BRIEF POINTS, ABSTRACTS AND AUTHORITIES OF THE PLAINTIFF IN ERROR.

THOS. J. SEMMES,

Of Counsel for Appellant, and Plaintiff in Error.



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This is a suit instituted on the 20th February 1868, and citation was served the 29th of the same month, by the defendant in error, against the plaintiff in error, on a bond for $4500, payable 1st January 1858, with interest from 1st January 1857.

There are several endorsements on the bond, signed by the defendants in error. The last is dated 2d February 1863, for $472 50, in payment of interest to 1st January 1863. During the war of the rebellion, the defendant in error, Alston, was domiciled and resided in South Carolina, and the deceased, Adger, and his administrator, after his death, resided in Louisiana. The defences in the Court below, were,

1st. The consideration of the bond was slaves and therefore, its payment, could not be enforced.

2d. The plea of prescription.

The first defence we pretermit.

The validity of the plea of prescription depends on the correctness of the opinion expressed by the Court below, in overruling the plea of prescription, and in instructing the jury that as between citizens of the rebellious states when the defendant was a citizen of Louisiana, the time from 26th January 1861, to 2d and 22d August 1866, should be deducted in computing the period of prescription.

There are several minor questions in the case, as to the admisibility of parol evidence for the purpose of interrupting prescription, which are presented in the bills of exceptions, and will be examined in their order.

The errors for consideration in this case are presented by the bills of exceptions, to be found at pages 7, 9, 11, 12 and 13 of the printed transcript.

1. It was error to overrule the exception of prescription pleaded in the answer (3), and the special plea (4), filed on the 25th of February, 1870; the bill of exceptions (13) shows:

That on the 16th January 1871, "the exception of prescrip-
"tion was called up and argued, and the defendant by his
"counsel moved the Court to dismiss the suit on the ground
"that, by the laws of Louisiana, the claim of the plaintiff, as
"set forth in his petition was lost and barred by the prescrip
"tion of five years, according to the statute of said State of
"Louisiana. No evidence was offered on the exception, but
"the same was tried on the petition and exception; whereupon
"the Court overruled and refused the motion of the defendant's
"counsel, and decided that the said obligation sued on was
"not barred by prescription, on the ground that the United
"States Courts in Louisiana were suspended from 26th January
"1861, until the 24th of June 1863, and that this time, and
"indeed the whole of the time of the late rebellion or late civil
"war, viz: from the 26th of January 1861, when the ordi-
"nance of Secession was passed by the Convention in Louis-
"iana, to the 2d August 1866, when the proclamation of the
"President of the United States was made, declaring the
"restoration of peace between the States, should be deducted
"from and not counted as the time during which prescription
"ran, and therefore there was not a period of five years between

"the claim as made in plaintiff's petition, to the service of "citation in the suit at bar, say 29th February 1868, to which "ruling of the Court, the defendant by his counsel ex-"cepted."—13.

The plea of prescription was tried by the Court before the case went to the jury, on the petition and exception and was overruled on the grounds above set forth in the bill of exceptions.

The exception of prescription is a peremptory exception founded in law, C. P., 345. And is in the nature of a plea in bar at the common law, 3 Blackstone, Com., 306; which, "without going into the merits of the cause shows that the plaintiff can not maintain his action, either, because it is prescribed, or because the cause of action has been destroyed or extinguished," C. P., 345. "They may be pleaded at every stage of the action, previous to definitive judgment," C. P., 346. And are to be tried by *the Court* as questions raised by a plea, although they "do not touch the merits of the cause," Fisk vs. Fleming, 15 La,, 202; yet if sustained the judgment thereon must be final, and have the force and effect of *res adjudicata;* if overruled, the defendant has the right to go before the Conrt and Jury on the merits.—15 La., 202.

The Court having decided the peremptory exception against the defendant, judgment was final on that plea, and was *res adjudicata* between the parties, and therefore the question of prescription could not be submitted to or decided by the Jury.

At the trial of the exception no evidence was offered, although either party could have done so, and if taken by surprise the plaintiff could have obtained time to produce proof, or have offered the testimony then on file to show interruption or renunciation of prescription.—C. P., 346.

The averments of the petition merely show that the estate of Adger was indebted; that interest had been paid to the 1st January, 1863; "all of which will appear by said bond annexed for reference and made part of this petition." This reference to the bond, it was contended in the Court below, included the bond and all the endorsements thereon, and made them allegations and averments of the petition itself. While

we deny the correctness of the position taken, we are willing for the sake of the argument to admit such to be the case, yet, although the bond being part of the petition, was before the
orsements thereon, which were not referred to in
ere not before the Court; but even if before the
uld only have the effect given by law, and did
efendant, when produced for the purpose of show-
n or renunciation of prescription, and the Court
deciding the exception of prescription against
the judgment should be for the defendant on

These endorsements are not entitled to any weight, for they have, in law no date; they are what are termed acts *sous seigne privè*, acts under private signature. Revised C. C., 2240, 2241, and our courts have decided that "an act *sous seigne privè* has no date against third persons," "unless the real date be proved by evidence *de hors* the instrument."

Corcoran vs. Sheriff, 19 La., 140; 2 An., 311; 11 An., 275; 2 Martin, N. S. 171; 6 Martin, N. S., 332.

Third parties are those who do not sign or produce the act.

The Supreme Court of Louisiana has decided what effect is to be given to endorsements on written obligations as affecting the question of prescription, and has said—

"It seems, the endorsement of the last credit, is in the handwriting of the plaintiff, who testified that it was made with the knowledge and consent of Valery J. Mayeux, one of the defendants, who promised to pay and offered to pay the balance of the note, but the witness thinking the debt well secured left it in the hands of the defendant." "Prescription had accrued prior to the date of the credit last appearing on the note, and the Act of 1858 requiring a written promise of the debtor to pay the debt in order to revive the obligation; we think the judgment correct."—"Judgment for defendant." Arcaud vs. Mayeaux, 23 An., 171.

In another case the same Court said: "It is contended that the payment credited on the note 26th June 1860, acknowledges the debt *and interrupted* prescription, but there is no evidence showing by whom and when the payment was made,

and it is well settled that without such proof the credit would not interrupt prescription, 11 R., 449; 4 A. 419; 7 A., 548; 10 A., 275; 12 A., 661; therefore the prescription commenced running from the 8th January 1859, and the note was *prima acie* prescribed on the 9th January 1864, in that case it was incumbent on the plaintiff to prove facts or circumstances, showing that prescription had been interrupted or suspended. There is nothiing in the Record showing that the plantiff could not have brought his suit sooner; the mere existence of the war did not suspend prescription as a general rule. Upon questions of prescription the circumstances and facts of each case, and the respective situation and residence of the parties must be taken into consideration as to the impossibility of bringing suit."

Manson vs. Robertson, 19 Ann., 170.

The endorsement of partial payment is insufficient to interrupt prescription, Spone vs. Daniel, 11 Rob. La., 449. "We are of the opinion that the District Judge did not err in refusing to consider the note as relieved from prescription by the endorsement which appeared on it. It matured in 1841, and on the back was written: 'Received on the within from J. E. Morehouse eighty-one dollars in gold, December 11th, 1843.' This suit was brought in March, 1848. There was no evidence to show in whose handwriting the endorsement was, nor when it was put there."

McMasters vs. Mather, 4 Ann., 418; Maskell vs. Pooley, 12 Ann., 661.

"It appears by a comparison of dates above given, that both claims are prescribed." "The plaintiff was bound, therefore, as to that note to establish a renunciation of prescription, and of this there is no legal evidence. *Such renunciation can only be established by written evidence.*" Laws of 1858, No. 208, § 4. It will not be seriously contended, that the plaintiff can make such evidence for himself by simply writing upon the instrument the receipt which appears endorsed on it. *Nor can the parol testimony of the plaintiff in the Record be permitted to establish a renunciation.* The Statute of 1858 is positive in requiring the written proof."—Offort vs. Chapman, 21 A., 293.

"A verbal promise to pay after the lapse of the period of prescription did not operate a renunciation thereof."

Megebben & Brother vs. J. Moore Wilson, 21 Ann., 748.

And if not as to a living person, how could it operate an interruption or renunciation against an estate? And can memoranda not signed by the debtor or his agent, be considered to be more effective than verbal acknowledgments?

If the endorsements were before the Court, they could have no effect in interrupting or renouncing prescription.

The obligation sued on was prescribed in five years, Act of Louisiana Legislature of 1852, page 90, Civil Code, 3540. It matured 1st January, 1858; citation was served 29th February, 1868, thus more than ten years had expired; the Supreme Court of this State in considering the effect of such obligations has decided, that "the instrument sued on being an unconditional engagement to pay a certain sum of money, cannot be classed among the personal actions, which, by the Code are prescribed in ten years." "The Judge *a quo* did not err in applying the prescription of five years."—Bank of Louisiana vs. Williams, 21 Ann., 122.

The suit is against a succession, and when such is the case, and prescription has commenced to run or been acquired, it can only be interrupted or renounced by a written acknowledgment or promise to pay, signed by the party deceased or his specially authorized agent; the words of the Statute are:

"Hereafter parole evidence shall not be received to prove "any acknowledgment or promise of a party deceased to pay "any debt or liability against his succession, in order to take "such debt or liability out of prescription, or to revive the same "after prescription has run, or been completed, *but in all such "cases the acknowledgment or promise to pay shall be proven by "written evidence, signed by the party deceased or his specially "authorized agent, or attorney in fact.*" Revised Statutes of Louisiana of 1869, Section 2819, page 550. This law originally enacted in 1858 has been in force ever since, and as part of the remedy is applicable to this case.—Story's Conflict of Laws [*482], § 576; Hanger vs. Abbot, 6 Wallace, 538.

2. It was an error to admit in evidence to the Jury any

testimony relating to the question of prescription, or the interruption of prescription, for the reason, that the question of whether the prescription had been acquired, had been finally decided by the Court before the case went to the Jury, no case can be tried twice, once by the Court, and again by the Jury.

3. It was an error to admit in evidence to the Jury the testimony referred to in the bill of exceptions at page 11, which is in these words:

"To the introduction in evidence of the endorsements on said bond, defendant by his counsel, objected, on the grounds following, to wit:

1. They were not signed by the deceased, John Adger, nor was any proof adduced to the Jury that they were made by his consent, or by his authority, or at his request, except the testimony under commission of McCants and others, and that of D. W. Aiken, heretofore recited and referred to and excepted to herein.

"2. They were offered to prove interruption of prescription, "which by the law of Louisiana cannot be done against a "deceased person or his estate, except by the production of "the written acknowldgement or promise to pay, made and "signed by the deceased.

"3. They were offered to show interruption of prescription, "which could not be done; the Court having already decided "the exception of prescription against the defendant, and the "question of prescription was not before the Jury.

"All which objections were overruled by the Court, and the "said testimony allowed to go to the Jury on the grounds "that the United States Courts in Louisiana were suspended "from 26th January 1861, until the 24th of June 1863, and "that at this time (and indeed prescription was interrupted "from the 26th January 1861, the date of the passage of the "Ordinance of Secession of the State of Louisiana to the 2d "August 1866, the date of the proclamation of peace) the "bond was not prescribed, and it was immaterial whether the "evidence should be read to the Jury or not. The whole case "was before the Jury, the plea of prescription included."—11.

The three foregoing grounds in the third exception of error, have been argued in considering the first error assigned, so far as the objections were argued by the counsel, and set forth in the bill of exceptions, but the ground on which the Court overruled these objections, and all the other objections to the testimony offered by plaintiff is material, and we propose to consider it now, it is as follows: "That the United States Courts in Louisiana were suspended from the 26th January 1861, until the 24th of June, 1863, and at this time (and indeed prescription was interrupted from the 26th January 1861, the date of the passage of the Ordinance of Secession of the State of Louisiana to the 2d and 22d August 1866, the date of the proclamation of peace) the bond was not prescribed, and it was immaterial whether the evidence should be read to the Jury or not. The whole case was before the Jury, the plea of prescription included."

Prescription is a bar created by the Statute of the State of Louisiana, and the interpretation of that Statute by the Courts of Louisiana, must govern its application in the Courts of the United States, exercising jurisdiction within the State.

In the case of Williams vs. Kirtland, 13 Wallace, 311, it was decided that: "This [the] construction of a State law upon a question affecting the titles to real property in the States by its highest Court, is binding on the Federal Courts."

By the Code of Louisiana, prescription is a *manner of acquiring property* and discharging debts by the effect of time, under the conditions regulated by law.—C. C., 3420.

"The construction given a statute of a State by the highest judicial tribunal of such a State, is regarded as a part of the statute, and is as binding upon the Courts of the United States as the text, Shelby vs. Gay (11 Wheat., 351); McCluny vs. Silliman (3 Peters, 270), etc. It the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute and reverse its former decisions, this Court will follow the latest settled adjudication, United States vs. Morrison (4 Peters); Green vs. McNeil's Lessee (6 Peters, 291)."

Leffingwell vs. Warren, 2 Black, 603; Suydam vs. Williams, 24 Howard, 427.

The Courts of Louisiana determined "that the mere existence of the war did not suspend prescription as a general rule; upon questions of prescription, the circumstances and facts of each case, and the respective situation and residence of the parties must be taken into consideration as to the impossibility of bringing suit."

Munson vs. Robertson, 19 An., 171.

The textual provisions of the Civil Code on the subject seem plain and unambiguous; and were the question, now presented for the first time for adjudication, there could not be much room for doubting how to determine it." Article 3420 declares: "Prescription is a manner of acquiring property and *discharging debts by the effect of time and under the conditions regulated by law*." Article 3487 declares: "Prescription *runs against all persons*, unless they are included in some exception *established by law*." The exceptions are enumerated in the Code. The existence of a state of war is not among the exceptions *established by law*, neither is the inability to sue, except in a few instances expressly mentioned.—C. C., 2512, 3488, *et seq.*

It is manifest therefore, that the rule *contra non valentem agere non currit prescriptio*, is not recognized in the Code, except in cases expressly mentioned."

Smith vs. Stewart, 21 An., 76.

A claim held by a resident of New York, an adhering State, against a citizen of Louisiana, a seceding State, was not therefore affected by the prescription enacted by the latter State, during the time of the war. 13 Statutes at Large, 123, Act of Congress of 11th June, 1864.

Auchincloss vs. Frois, 24 An., 31.

But the Act of Congress 11th June, 1864, was intended to and did only apply, as decided by the Supreme Court of Louisiana, to cases between citizens of States of the opposing sections of the country, and the cases of Hanger vs. Abbott, 6 Wallace, and Stewart vs. Kahn, 11 Wallace, 502; and all the other cases, where it was decided by the Supreme Court of the United States, that prescription was interrupted during

the war, were cases between citizens of the opposing sections of the country, and the point decided was, that no intercourse could be maintained, and no action could be brought during the continuance of the war, by one against the other, and prescription was interrupted from the necessity of the case, as there could be no intercourse between belligerents until the war ceased by public proclamation.

It will be seen, that by the law of Louisiana, and by the decisions of the Supreme Court of that State, already referred to, that the debt sued for was prescribed, and could not be recovered in any Court in that State. Such being the case in the Louisiana Courts, we feel justified by the law in saying that the Courts of the United States must follow the decisions of the State Courts, in interpreting the State laws, as between persons affected by those laws.

There is no doubt, that as regards parties, who were citizens of the opposing sections of the Union, the war of rebellion interrupted prescription during the whole time of the war, but such was not the case, as between the citizens of either section. And the Supreme Court of this State have gone so far as to hold, that the rules of prescription enacted in the Code, apply to the State, because no express exception has been made n favor of the State.—Mahan vs. Tignor, 23 Ann., 570.

But conforming to the doctrine in 11 Wallace, 493, the Supreme Court of Louisiana decided that, the rule '*contra non valentem agere non currit prescriptio*,' could not be invoked by a citizen of New York, when sued by a citizen of Massachusetts in the Courts of the United States, or the Courts of the States, nor could it be invoked by a citizen of South Carolina against a citizen of Louisiana—and if not, then, the interruption of prescription must rest on some exception to be shown, which has not been done in the case before the Court, nor could it be done, for the parties were all within the same military lines, and could sue and be sued, contract and bind themselves to each other, as if in a state of peace, during the whole period of the war.

If there was any time to be deducted, as between parties residing within the same military lines, it must be such time

as can be shown, that the Courts were closed against them, and no such proof was made—the judge *a quo* declared in his decision, that the United States Courts were closed from the 26th January, 1861, to the 23d June, 1863, a period of less than two years and six months. What was there to have prevented the plaintiff from instituting his suit after the 23d June, 1863? The fact is that the rebellious army surrendered in June, 1865, a period of less than four years and six months, from the 26th January 1861, the time prescription was interrupted according to the learned Judge, what prevented the plaintiff from having his citation served after the month of June 1865? Ever since that time, the United States arms, and the United States authority and laws extended over the whole of Louisiana, and the process of its Courts could have been served without obstruction—deduct four years and six months, from ten years and two months, and there is left a period of five years and eight months, during which the plaintiff could have exercised his right of action.

It was error to admit in evidence to the Jury the letter of John Adger, dated January 22d 1865, referred to in the bill of exceptions at page 11, which is in these words:

"2. To the introdnction in evidence of the letter of John "Adger, dated January 22d 1865, defendant by his counsel "objected on the ground following:

"1st. Because the same was confidential and addressed to "the agent of the writer, and not to the creditor or his agent, "and contains the authority to compromise, and not the "acknowledgment of a debt, nor the promise to pay a debt, "which must be made to a creditor or his agent, and could not "be produced as such against a dead man or his estate."

These objections "were overruled on the grounds as afore-"said, that the bond sued on was not prescribed; that the United "States Courts in Louisiana were suspended from the 26th "January 1861, until the 24th June 1863, and that this time, "and indeed the time from 26th January 1861, to the 22d "August 1866, being deducted from the period for which "prescription ran, and further, that the same was proof of an "act of the late John Adger, and that the testimony was ad-

"missible, for the purpose of showing the recognition by John "Adger during his life time, of the validity of the obligation "sued on."

The objection to the admission of this letter is that: "The same was confidential, and was addressed to the agent of the writer, and not to the creditor or his agent, and contains the authority to compromise, and not the power to make acknowledgment of a debt, nor the promise to pay a debt, which must be made to a creditor or his agent, and could not be produced as such against a dead man or his estate; this letter is in the following few words: "I owe the *McCaul estate or Bryan* some money for negroes. I bought and gave my note; I wan't to lift my note, and wrote to McCaul to see Bryan, if he would take the money, if so, to sell enough of my cotton to pay the debt, or to trade cotton to him. Try and get it settled up if possible.

J. ADGER."

The special power to make acknowledgment of, or promise to pay a debt is not contained in the letter; the letter does not acknowledge the existence of a specific debt, nor does it contain the promise to pay a debt. It is, in fact, nothing more than authority to offer a compromise, which if accepted, the agent was authorized to carry out, and not having made the offer, which he was authorized to make, the authority of the agent ceased. It is a mere authority to compromise, addressed to the agent of the writer; can that be used against his estate, to show an acknowledgment or promise by the agent to pay a debt, when no intention is evidenced by the document, to give authority to make such acknowledgment or promise to pay, in writing, sufficient to interrupt prescription; for it must be observed that the law of Louisiana requires to interrupt prescription, the *acknowledgment and promise* to be in writing, and be signed by the party or a special agent for that purpose? — Sec. 2818, Revised Statutes.

The letter was an authority to offer a compromise, was private and confidential, and should have been excluded, the decisions on this point are as follows:

"The rule undoubtedly, is that an offer to pay any sum of

money by way of compromise of a pending controversey, is not to be given in evidence against the party making it. The rule is founded in policy, that there may be no discourgement to amicable adjustment of disputes, by a fear, that if not completed, the party amicably disposed may be injured."—Parker, Chief Justice, in Gerrish vs. Sweetze, 4 Pickering, 377.

"The proposition to give twenty-five dollars to settle the demand must be laid out of the case, because that was a mere peace offering, and being rejected, it cannot prejudice the defendant."—13 Johnson, 288.

"The general proposition stated in the books is, that an offer to pay money by way of compromise to get rid of an action is not evidence of a debt."—2 Pickering, 289.

"The rule of evidence is, that mere proposals for a compromise, or the conversations or negotiations which may take place for the purpose of effecting one, are not generally admissible as evidence, but if in the proposals, conversations or negotiations, any fact *or distinct* liability is admitted, evidence may be given of that, but the party who is attempted to be charged in this manner, is entitled to have the benefit of all the conversations or proposals; the whole shall be considered by the Court and Jury."—11 La., 11.

That portion of the letter which says: I owe the McCaul estate or Bryan some money; I want to lift my note," is not a written acknowledgement or promise to pay, signed by the deceased debtor himself, and contains no facts from which the interruption or renunciation of prescription can be presumed so as to dispense with the proof required. There was nothing more in the letter than the necessary explanation, to enable the agent to offer to buy peace for the writer.

The admission of a debt, contained in an offer of compromise, to be effective to interrupt or renounce prescription, by the law of Louisiana, must be an *acknowledgment or promise* to pay, written and signed by the party deceased. The letter to Herron does not contain an acknowledgment, it is not the statement of a definite fact; that the writer owed "some money for negroes," is not the acknowledgment or promise to pay; that "I bought and gave my note" is not the acknowldgement or

promise to pay that note, the admission is as to the fact of a note, not that the amount of the note is due or owing, not a promise to pay the amount of that note, and the two expressions taken together, amount to nothing more than an expression of the fact, that the deceased *owed some money* for negroes, for which he gave his note, and that he wanted to pay it, if the party holding would take the [Confederate money] money or cotton in payment. These expressions might be good if joined with facts, separate and distinct, to make out a case of indebtedness against a defendant, but are not sufficient to meet the stringent requirements of the law of Louisiana, *which demand a written acknowledgment or promise to pay*, to interrupt or renounce prescription against the estate of a deceased person.

"The acknowledgment of a debt, in order to interrupt prescription, must be *specific, an acknowledgment of the debt.*"

Conway vs. Williams, 10 La., 569–570.

"It must be with the intention of acknowledging said debt, for the purpose for which those conversations are now used, to wit: to interrupt prescription."

"Nothwithstanding the number of witnesses who have proved that Dassize Bossier recognized himself largely *indebted to the plaintiff*, the acknowledgment was not of a *particular* and *specific debt*, it was not an acknowledgment of *the debt*, it was not made to benefit the plaintiff."

Buard vs. Lemee, 12 Rob., 251.

To interrupt prescription, "the promise *must be made to the creditor or some one acting for him*, or if made to a third person must be *calculated and intended to influence the action of the creditor.*"—5 Selden, N. Y., 85.

"An acknowledgment of a debt or judgment, to take the case out of the statute of limitations, or bar by lapse of time, must be made not to a mere stranger, but *to the creditor* or some one acting for him, and upon *which the creditor is to act or confide.*" 2 Story's Eq., 1521 A. And in the present case, the offer never was made by the agent of the debtor to the creditor, or any one else; he ascertained on inquiry, that it would be useless to make the offer.

"We cannot find in the language used any direct, absolute

promise to pay in any event; on the contrary, the promise was made with a condition, and cannot be taken against the defendant *as a clear* voluntary *renunciation of the prescription which had accrued.*"

Doyle vs. Kettridge, 21 An., 276.

The fact that the letter contained no acknowledgment or promise to pay to the creditor, or to a person representing him, and was not made for the purpose of, and did not influence his action, should have excluded the letter, and if admitted, it should not have had the effect given to it, of interrupting or renouncing prescription.

5th. It was error to admit in evidence the testimony of R. A. Herron, which is contained in the bill of exceptions (11), in these words:

"To the introduction in evidence of that portion of the testi-
"mony of R. A. Herron, as follows: 'John Adger wrote to
"'me, who was then acting as agent for his business in the
"'particular locality, and requested me to ascertain whether I
"'could pay off the Bryan bond, as he termed it (which is the
"'same bond now sued on), with Confederate currency, and
"'if I could do so, he wished me to sell some cotton, and
"'apply the proceeds to the payment of the bond. Upon con-
"'ference with some parties here, I learned that Confederate
"'currency would not be received for the bond, and hence did
"'not sell the cotton.'" The defendant, by his counsel, objected,
"'on the grounds—

"1st. That the same is the proof of an authority to offer a
"compromise, which does not appear to have been exercised,
"and if exercised, the offer of compromise cannot be offered
"in evidence, and being evidently a statement of the contents
"of the letter already adduced, cannot be admitted, being
"secondary evidence, when the original and best proof is at
"hand.

"2d. It is offered to establish an interruption of prescription
"by parol proof, as against a dead man and his estate, which
"is not allowed by the law of Louisiana."

The testimony of the witness is clearly nothing more than secondary evidence as to the contents of the letter, without

laying the foundation required by proof of loss, etc., of original, and clearly inadmissible; and if he was speaking of the letter of 22d January 1865, it was an attempt to prove by parol, the contents of a written document, then in Court, and this also was inadmissible. Greenleaf on Evidence, § 88 and § 463.

The second ground of objection has already been argued, and there is no doubt that parole evidence could not be received for any such purpose.

6th. It was error to admit in evidence the testimony of James B. McCants, which is set forth in the bill of exceptions (11) in the following words:

"4th. To the admission in evidence of that portion of the "testimony of James B. McCants, as follows: "and that the en- "dorsements of credits thereon are correct. The last payment "was made by me as agent and attorney of said John Adger, "dead, on the 2d February 1863, and was subsequently ap- "proved by him by his letter to me. The deceased, John Adger, "frequently in his life-time talked to me on the subject of the "bond before mentioned, and as late as May, 1866, wrote me a "letter in which he stated, that he intended to pay all the "debts, which he as principal owed in South Carolina. This "letter is now in my possession. My conversations and cor- "respondence were altogether with John Adger, the principal "obligor on the bond, who frequently talked to me, and "corresponded with me about his business affairs, on the "grounds:

"1st. That the same is an attempt to prove by parol, that "which the laws of Louisiana require to be proved by written "acknowledgment or promise, viz: the interruption of pre- "scription as against a dead man or his estate, which cannot "be done.

"2d. That the same is an attempt to prove by secondary "evidence that which the law requires to be proved alone by "the production of the primary evidence of the fact, viz: the "written acknowledgment or promise of the deceased debtor "to pay the debt."

The admission of the contents of the letters which the wit-

ness says he possessed, and of correspondence with the deceased debtor is secondary evidence and not admissible, nor were the verbal statements.

The facts proved by the witness, that the endorsements of credits on the bond were correct, and that the last payment ($472 50) was made by him, and subsequently approved by Adger by letter, were no more admissible than any other fact to show interruption of prescription, it was not a written acknowledgment or promise, signed by the deceased debtor.

The proof of agency by the witness was also a fact, that is required under the Statute of Louisiana to be in writing, else verbal proof could be made of an agency, and the written proof signed by such verbally created agency, could be adduced to defeat the operation of the Statute, and this case is one that illustrates the reason of the law, the testimony, is that of one of the parties to the solidary obligation sued on, it is to a fact, which is relied on to interrupt or defeat prescription, the effect of which is, to throw the burden from the witness on the estate of his deceased co-obligor, and the effect of this proof of these facts, is, to make the verbal statement of an interested witness, take the place of and defeat the statute, which requires the acknowledgment or promise to pay, to be in writing *and signed by the deceased, or his specially authorized agent or attorney in fact.*

7th. It was error to admit any evidence to go to the Jury to show interruption or renunciation of prescription, as against the estate of John Adger, deceased, other than *written evidence signed by the party deceased, or his specially authorized agent or attorney in fact.*

8th. It was error in the ruling of the court below to decide "that the bond sued on was not prescribed; from the fact that the United States Courts in Louisiana were suspended from 26th January 1861, to the 22d August, 1866;" this point has been so clearly and satisfactorily shown in the former part of this argument, to be well taken, that further discussion is useless, and it is apparent the bond was prescribed when this suit was brought, ten years and two months having expired from the date of its maturity.

9th. It was error in the court below in ruling, "that the same was proof of an act of the late John Adger, viz: the payment of part of said bond, which was a fact, which by law interrupted prescription against a dead person or his estate, as well as a written acknowledgment or promise of a deceased person to pay a debt." This is clearly in violation of the language and reason of the State Statute, which excludes all testimony as to any act of the deceased debtor, and requires the proof not only to be in writing, but to be signed by the deceased, or his specially authorized agent or attorney.—Revised Statutes, 2819.

10th. It was error in the court below, when "the judge stated in the presence of the jury, that the testimony (meaning all the testimony objected to) was admissible for the purpose of showing the recognition by John Adger during his life-time of the validity of the obligation sued on" (12). This point has been so fully argued, and this ruling shown to be so erroneous, that nothing further need be said upon this error.

11th. It was error in the ruling of the court below, when the Judge said, "the bond was not prescribed, and it was immaterial whether the evidence should be read to the jury or not."

In other words, the judge claims the right to allow testimony to go to the jury that is illegal and improper, because in his opinion immaterial. He might as well at once have admitted parol proof of a verbal promise, on the part of John Adger, to pay the debt, and thus avoid the plea of prescription.

The whole of the case turned upon the fact, whether prescription had accrued, the Court decided that it had not, that the time had not run; that such being the case, he would allow the plaintiff to show, and he did so allow the plaintiff to show, that the prescription which he had already decided, had not accrued, had been interrupted or abandoned by acts of the defendant, as if the same had accrued; and this immaterial evidence was admitted in violation of a plainly written law.

Had all the testimony which was objected to been ruled out, as it should have been, the case would have stood on the bond alone, and thus it would have been apparent that the obliga-

tion sued on, had been extinguished by the lapse of time, unless the Judge was right in saying that the whole period of the war, viz: five years and six months, should be deducted in computing prescription, as between the citizens of the rebellious States, and on this point the defendant below, plaintiff in error, is willing to submit his case.

Respectfully submitted,

THOS. J. SEMMES, Wm. A. Melony

Of Counsel for Appellant, and Plaintiff in Error.

abandonment of prescription is an act of ownership which no agent can exercise without special authority to do so.

Hart v Barlow 6. Robinson 149.

If the law requires the contract to be in writing the power to execute it must be in writing

6 L. 296 - 296. - Rich. 299 - 299.

Miller v Canal Bank 8 Robinson 242

Stephens v Willington 1. Ann 73

Phelps v Hodge 6. Ann 525.

To acknowledge a debt the power must be more specific than to create one.

Richard v Bird 4 La 210

Spears v Turpin 9 Robinson 293

offer to pay a debt in confederate money does not waive or renounce prescription.

65 - M L. 525.

Wm. A. Melony

for Plff in E.

Supreme Court of the United States

No. 182.

WM. E. ADGER, ADM'R OF JOHN ADGER, DECEASED,
Plaintiff in Error,

vs.

WILLIAM S. ALSTON, EXECUTOR OF WILLIAM J. ALSTON,
Defendant in Error.

ERROR TO THE CIRCUIT COURT FROM LOUISIANA.

Additional points, authorities, and argument of Plaintiff in Error.

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Supreme Court of the United States

No. 182.

WM. E. ADGER, Adm'r of John Adger, deceased,
Plaintiff in Error,

vs.

WILLIAM S. ALSTON, Executor of William J. Alston,
Defendant in Error.

Error to the Circuit Court from Louisiana.

Additional points, authorities, and argument of Plaintiff in Error.

It was error in the Judge below, as well in his decision on the plea of prescription as in his charge to the jury, that, in computing the period of prescription, the time from the 26th January 1861, to the 2d and 22d August 1866, should be deducted; because, according to the decision in the case of the Protector, the time to be deducted is confined to the period between the 19th April 1861, and the 2d April 1866.

The Protector, 12 Wallace, 700.

The obligation sued on, matured on the 1st January 1858. From that day to the 19th April 1861, was a period of three years, three months, and nineteen days; add to this, the period from the 2d day of April 1866, to the 29th day of February 1868, to wit, one year, ten months, and twenty-eight days; and it will be seen, that more that five years elapsed from the time the cause of action accrued, until the institution of the suit.

To state it otherwise. The whole period from 1st January 1858, when the cause of action accrued, to the 29th February

1868, when the citation was served, was ten years, one month, and twenty-nine days; deduct the period of the war, from 19th April 1861, to 2d April, 1866, say five years and seventeen days; there remains a sufficient period to bar this suit, to wit, five years and forty two days.

2d. Abandonment of prescription is an act of ownership, which no agent can exercise without special authority to do so.

Hill vs. Barlow, 6 Robinson, 149.

If the law requires the contract to be in writing, the power to execute it by an agent, must be in writing.

Civil Code, 2966, 2992, 2997.

Miller vs. Canal Bank, 8 Rob., 242.

Stevens vs. Wellington. 1 An , 73.

Phelps vs. Hodge, 6 An., 525.

To acknowledge a debt, the power must be more specific than to create one.

Richards vs. Bird, 4 La., 310.

Spear vs. Turpin, 9 Robinson, 293.

An offer to pay a debt in Confederate money, does not waive or renounce prescription.

65 N. C., 525.

It has been held that a renewal, written on the back of a note, and purporting to have been signed by the defendant, the maker of the note, was not offered in evidence by the mere offer of the note, and was not before the court. His plea of general denial admitted the signature to the note only, the agreement on the back of the note is not considered to be a part of the note *non constat*, that if it had been offered in evidence, the defendant would not have objected to it, and denied his signature.

Boulin vs. Rainey, 21 An., 335.

Thus it is plain, that when the bond was referred to and made part of the petition, the endorsements, being separate and distinct from the bond, were not made part of the petition, and were not before the court or jury as part of the petition, and could not be considered as having effect upon the plea ot prescription tried by the court. No evidence was offered on the trial of that plea, and on the face of the bond it was barred by prescription.

It is equally clear, that the endorsements were not offered as evidence to the jury, when the bond was offered (see notes of evidence, page 7), nor offered at all, except subject to the bill of exceptions (page 11), which covers the ground now urged, that they were not proved; therefore, not properly before the jury, should have been excluded, and if excluded, the verdict should have been for the plaintiff in error,—as the judgment on the plea of prescription, tried by the court, should have been.

Respectfully submitted,

THOS. J. SEMMES,
Of Counsel.

Supreme Court of the United States.

DECEMBER TERM, 1872.

WILLIAM E. ADGER, Executor of John Adger, Plaintiff in Error

vs.

WILLIAM S. ALSTON, Executor of William J. Alston, Defendant in Error.

No. 182.

DEFENDANT'S BRIEF.

STATEMENT.

This was a suit below on a bond conditioned for the payment by the testator, John Adger, to the testator, William J. Alston, the sum of $4,500, on the 1st day of January, 1858, "with interest thereon from the 1st of January, 1857, the interest on the above amount to be paid annually until the principal is paid."

Payments of the interest due are indorsed on the bond in 1857, 1858, 1859, 1861, and 1863.

The last indorsement is as follows:

"Received four hundred and seventy-two dollars and fifty cents, interest due up to 1st of January, 1863, February 2d, 1863. W. J. ALSTON."

Citation on the suit was served on the defendant February 29th, 1868.

The defendant set up two defences: failure of consideration, the bond having been given for slaves subsequently emancipated; and the statute of limitations or prescription of five years, as it is termed in Louisiana.

As to the defence of failure of consideration from

emancipation, it is not necessary to discuss it, this question having been settled by the decision of this court in White *v.* Hart, 13 Wallace, 647.

As to the remaining question of prescription, or the statute of limitations.

The statute of Louisiana, under which the question of prescription is raised, is, so far as it is deemed necessary to cite the same, as follows:

"SEC. 2. Hereafter parol evidence shall not be received to prove any acknowledgment or promise of a party deceased to pay any debt or liability against his succession in order to take such debt or liability out of prescription, or to receive (revive) the same after prescription has run or been completed; but in all such cases the acknowledgment or promise to pay shall be proved by written evidence, signed by the party to be charged, or by his specially authorized agent or attorney in fact.

"SEC. 4. Hereafter parol evidence shall not be received to prove any promise to pay *any written obligation when prescription has already run*, but that in *all such* cases the promise to pay shall be proved by written evidence."

Acts of Louisiana of 1858, No. 208, p. 148.

It is submitted,

1. That the said 2d section does not apply to "any written obligation," the 4th section only applying to "any written obligation."

As to "any written obligation," written evidence of any promise to pay is only required "when presumption has already run."

Prescription had not "already run" when the payments were made in this case, and so it was admissible to prove such payments by parol evidence.

In the construction of statutes, one part must be construed by another.

Strode *v.* Stafford Justices, 1 Brock., 162.

Where two sections of a statute are repugnant, the last one must prevail, as speaking the latest intent of the lawmakers.

Powers *v.* Barney, 5 Bl. C. C., 202.

2. If 2d section of act of 1858 is applicable to "any written obligation," then it is submitted—

(*a*) The "acknowledgment or promise," required by the 2d section of the act of 1858 to be proved by "written evidence," applies only to express acknowledgments or promises, and not to implied acknowledgments or promises.

Express acknowledgments or promises are the only ones that can be in writing, because implied acknowledgments or promises are deductions of law from a given state of facts.

Implied acknowledgments or promises are such because in fact they were never made.

To require implied acknowledgments or promises to be in writing is a legal absurdity, because they exist only in legal intendment, and not in fact.

Express acknowledgments or promises are spoken words. They can always be put in writing.

Implied acknowledgments or promises are not spoken words, but conclusions of law from antecedent facts. They cannot be in writing.

What can be in words, the statute requires to be in writing.

What cannot from their very nature be in words the statute does not require to be in words.

This distinction is supported by analogies in the law.

For example, the liability of a guarantor under statute of frauds being required to be in writing.

"The question whether each particular case comes within this clause of the statute (requiring the undertaking to be in writing) depends on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant (the guarantor) or his property, except such as arises from his *express promise*."

1 Saunders's R., 211, note *J*.

Smith's Contracts, sec. 46, p. 35.

Where the guarantor is liable on other grounds than his guarantee, the promise need not be in writing.

Ibid., sec. 48, note A, p. 36.

The principle deducible from these authorities is, that where the guarantor's liability arises only from his express promise, it must be in writing; but where the promise is implied no writing is required.

So the statute of frauds, which requires certain declarations of trust to be proved by writing, exempts trusts arising by implication of law; that is, express trusts must be evidenced by writing; implied trusts not.

Hill on Trustees, p. 56.

(*b*) The policy of the act of 1858, as of similar legislation of this character, was to guard against recollections of verbal statements or conversations, so difficult to remember precisely, and so easy of perversion.

"The chief object of the statute of frauds was to prevent the facility to frauds and perjuries held out by the enforcement of obligations depending for their evidence upon the unassisted memory of witnesses."

Smith's Contracts, sec. 32, p. 29.

This ojection does not apply to proving a fact like payment.

"The payment of principal or interest stands on a different footing from the making of promises, which are often rash or ill interpreted, while money is not usually paid without deliberation; and payment is an unequivocal act, so little liable to misconstruction as not to be open to the objection of an ordinary acknowledgment."

Per Tindal, C. J., in Wyatt *v.* Hudson, 8 Bingham, p. 302, vol. 21, E. C. L. R.

"We think payment of money by one of several joint contractors an acknowledgment not within the mischief or the remedy provided by the legislature against the effect of an oral promise."

Ibid.

The distinction between part payment and a verbal acknowledgment or promise is specially taken by Lord Tenterden, act 9 Geo. IV, c. 14. See act in full, Angell on Limitations, Appendix, ch. xx, p. 8. Edition of 1869.

We conclude, then, that the judge below was right in holding that the payments indorsed on the bond in this case were properly proved.

3. If deemed essential, there is written evidence of acknowledgment by the testator, Adger, in his letter to Herron. (Transcript, p. 9.)

It is objected that this letter is inadmissible on several grounds:

(*a*) Because it is a confidential letter.

It is submitted that there is no principle of law which exempts a communication to an agent from being evidence.

This privilege of exemption is confined only to communications to counsel.

Phillips on Evidence, p. 104.

(*b*) Addressed to an agent.

The acknowledgment to interrupt prescription need not be made to or in the presence of the creditor.

C. C., 3486, 3517.

Erwin *v.* Lowry, 2 L. A. R., 314.

Acknowledgments to a stranger are sufficient.

Angell on Limitations, sec. 269, and authorities cited in note 7.

Mountstephen *v.* Brooke, 3 Barnwell & Alderson, 142, vol. 5, E. C. L. R, p. 245.

2 Greenleaf's Ev., sec. 441.

(*c*) Offer to compromise.

The facts do not sustain this view. The letter to Herron was an unequivocal acknowledgment of the debt, with directions "to sell enough of my cotton to pay the debt, or to trade cotton to him. Try and get it settled up, if possible."

4. Acknowledgments by James B. McCants, being his deposition in this case, and he one of the obligors in the bond sued on, are sufficient, being in writing.

(*a*) As bound in *solido* with the principal obligor, John Adger, deceased.

The acknowledgment of one of the debtors in *solido* interrupts prescription in others.

Civil Code, (of La.,) 3517.

Succession of Voorhies, 21 Annual L. R., 661.

In this case the principal debtor was dead. The acknowledgment of his *guarantors* was not allowed to prevent prescription, because they were not bound in *solido* with him.

2 La. Annual R., 216.

Indorsement of partial payments in the creditor's handwriting on an obligation interrupts prescription, when proved that they were made before prescription acquired, and against creditor's interest, and have been recognized by the obligor's debtor in *solido*.

Beatty *v.* Clement, 12 La. Annual R., 82.

Bank *v.* Bradford, 14 La. Annual R., 159.

See further—

2 Greenleaf's Ev., sec. 444, p. 359.

Chippendale's Ex'rs *v.* Thurston, 4 Carrington & Paine, 98 E. C. L. R., p. 293.

Pease *et al. v.* Hirst *et al.*, 10 Barnwell & Creswell, p. 122; 24 E. C. L. R., p. 38.

(*b*) Further, as agent of the obligor, John Adger.

An agent's acknowledgment stops of prescription.

Civil Code of La., 3499.

5 Annual R., 437.

The bond sued on was not barred by prescription, as the war interrupted prescription. So that five years had not passed, within which it was possible for suit to be brought, from the date of the bond to the time suit instituted.

The court takes judicial notice of the war, its duration, &c.

The United States *v.* Probasco, 11 Ann. L. R., 419.

United States *v.* Fifteen Hundred Bales of Cotton, 10 Int. Rev. Rec., 52.

Waiving for the present the effect of payments made up to January 1, 1863, indorsed on bond February 2, 1863, and other evidence of payments and acknowledgments, the five years of prescription had not run out, within which suit could have been brought. In other words, there was not five years in which plaintiff below could sue between the time the bond was due, January 1, 1858, and the date suit was brought, February 29, 1868. Deducting from January 1, 1858, to February 29, 1868, the time within which suit could be brought, there was not five years left within which plaintiff below could sue.

From January 1, 1858, to January 16, 1861, when ordinance of secession passed in Louisiana, within which suit might have been brought, was ~~two~~ three years and ~~twenty-six~~ seven days.

From August 2, 1866, when rebellion declared ended, to February 29, 1868, within which suit might have been brought, was one year, six months, and twenty-seven days.

Adding up the whole period from January 1, 1858, to February 29, 1868, within which time suit could have been brought, is only ~~four~~ three years, seven months, and ~~twenty-three~~ days.

A state of civil war suspends the running of the statute, as to matters of controversy between citizens of the opposing belligerents.

Jackson Ins. Co. *v.* Stewart, 15 Am. L. R., 732.
Whitfield *v.* Allison, 2 Am. L. R., 188.
Hanger *v.* Abbott, 6 Wallace, 532.

13. U. S. Stat at Large p. 123

The principle of these cases, it is submitted, prevents prescription in the present case.

1. As to the exception to the overruling of the plea of prescription, we reply as follows:

The plea of prescription admits, so far as that plea is concerned, all the allegations in the petition. The petition alleges, that "said interest (the interest due on the bond sued on annexed to the petition, and expressly made part of it by recitals of the petition) has been paid to the first of January, 1863."

The plea of prescription admits then the execution of the bond sued on and payment of the interest thereon to January 1, 1863.

14 La. Reps., 368.

2 Hennen's Dig., p. 1148, and cases there cited.

As to admissions in pleadings, see further—

Greathouse *v.* Dunlap, 3 McLean, 303.

Tolland *v.* Sprague, 12 Peters, 335.

Archer *v.* Morehead, Hemp. C. C., 184.

It thus having been admitted that the interest was paid to January 1, 1863, the plea was properly overruled.

Further, even if the court below was in error in overruling the exception, yet, as the ruling on this point became immaterial in the progress of the case from the evidence introduced, the ruling is not assignable for error.

Blackburn *v.* Crawford, 3 Wallace, 175.

Further, the overruling the plea of prescription is not a final judgment, to which a writ of error lies.

Rutherford *v.* Fisher, 4 Dall., 22.

2. It is further objected that, after overruling the plea of prescription, it was error in the court below to admit evidence to the jury relating to the question of prescription.

To this objection we reply—

(*a*) The plaintiff below was not injured by this action of the court, as it gave him an opportunity to set up prescription a second time, (having claimed the benefit of it in his answer,) and so has no cause to ask a reversal on this ground.

Phillips *v.* Preston, 5 Howard, 276.

The Water Witch, 1 Black's R., 494.

(*b*) This was a matter of discretion in the court below, and so cannot be the subject of an assignment of error.

Cheang-kee *v.* United States, 3 Wall., 320.

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